Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

Petitioners,

-against-

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a commercial solid waste regulatory scheme adopted by the Town of Babylon, New York, without Congressional authorization, that eliminates competition within a commercial solid waste district and allows the town to provide exclusive commercial solid waste services within the district, financed by mandatory user fees, the practical design and effect of which is to compel generators of waste to use the town's services, and to cause 96,000 tons per year of commercial solid waste that previously was available to interstate commerce for recycling and/or disposal to be incinerated at the town's solid waste resource recovery facility, discriminates against interstate commerce and is prohibited by the dormant Commerce Clause of the United States Constitution.

2. Whether the requirement that irreparable harm be demonstrated before a preliminary injunction can be issued is satisfied by a showing that rights secured by the Commerce Clause of the United States Constitution will be violated if such an injunction does not issue.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are those set forth in the caption.

Pursuant to Supreme Court Rule 29.1, neither Petitioner U.S.A. Recycling, Inc. nor Petitioner Friendly Carting, Inc. has a parent or subsidiary company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners U.S.A. Recycling, et al. pray that a writ of certiorari issue to review the judgment and order of the Second Circuit Court of Appeals.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is

reported at 66 F.3rd 1272 (2d Cir. 1995). The decision disposed of Commerce Clause claims raised both in the instant case, and in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon.* The *A.A. & M.* petitioners filed a Petition for a Writ of Certiorari with this Court on January 30, 1996 (No. 95-1223). Both the decision of the Second Circuit, and the transcript of the proceedings of the District Court at which the order appealed from was rendered, are reproduced in the Appendix to the A.A. & M. Petition for a Writ of Certiorari, which Petition has been served on counsel for the Respondents here.[1] The decision and transcript are incorporated by reference herein ("A.A. & M. Appendix _____"). The decision of the Second Circuit is reproduced in A.A. & M. Appendix A at 1a-46a. The unpublished bench opinion of the United States District Court for the Eastern District of New York granting a preliminary injunction is reproduced in A.A. & M. Appendix B at 47a-101a. No written order was issued by the district court.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on September 19, 1995 (A.A. & M. Appendix 1a). Its order denying Petitioners' timely request for Rehearing with Suggestion for Rehearing In Banc, entered on November 16, 1995, is annexed hereto as Exhibit C (103a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art.

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[1] The issues presented in the instant case and *A.A. & M.* are not identical.

I, § 8, cl. 3, provides in pertinent part: "Congress shall have Power... To Regulate Commerce... among the several States...."

Pertinent portions of Babylon Town Code Chapter 133 (Solid Waste Management), adopted on January 10, 1995, and of the Commercial Waste Collection and Recycling Service Agreement Between the Town of Babylon on Behalf of the Town of Babylon Commercial Garbage District No. 2 and Babylon Source Separation Commercial, Inc., entered into on December 2, 1994, are contained in Appendix D hereto (104a et. seq).

STATEMENT OF THE CASE

Preliminary Statement:

This case involves the applicability of *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. ____, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) to a monopoly municipal commercial solid waste district that was created to insure that 96,000 tons per year of commercial solid waste, previously available to interstate commerce, would be delivered to that municipality's resource recovery facility for incineration. Although 96,000 tons per year of commercial solid waste were taken out of commerce altogether, and the United States Court of Appeals for the Second Circuit agreed that Babylon acted as a market regulator when it created the district and prevented all but a single carter from operating within it, the lower court concluded that there was no discrimination against interstate commerce. It reached this conclusion by relying upon two 90-year old decisions of this Court (*Gardner v. Michigan, 199 U.S. 325 [1905]*, and *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 [1905]) which together established that a municipality acts within its police powers when it grants to a single entity the right to collect and dispose of garbage, but did not discuss

whether the actions taken discriminated against interstate commerce in violation of the Commerce Clause. The Second Circuit recognized that these early cases were not dispositive of the Commerce Clause arguments raised by the petitioners, but "refuse[d] to undercut the longstanding precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." (A.A. & M. Appendix 43a).

The Second Circuit's ruling sustaining Babylon's exclusive control over solid waste services is inconsistent with rulings in the Third and Eleventh Circuits *(Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3rd 701 [3rd Cir. 1995], *and Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 [M.D. Ala. 1993], *aff'd* 29 F.3rd 641 [11th Cir. 1994]), decisions which the Second Circuit neither acknowledged nor discussed.

Petitioners do not challenge the right of the Town to form a collection district, or to have a competitive bid process, which, if properly conducted, can lead to the selection of a single contractor to provide collection services for waste generated by departments of town government, or by anyone else who wishes to use the offered services. This case presents the question whether, consistent with the dormant Commerce Clause, a municipality may provide exclusive solid waste services without prior Congressional authorization. It also presents the additional question whether a showing of likelihood of success on the merits of a Commerce Clause claim constitutes a sufficient showing of irreparable harm for the purpose of determining entitlement to a preliminary injunction.

Statement of Facts:

Prior to the creation of the commercial garbage district by the Town of Babylon, Long Island, New York, businesses within the town were free to contract with any carter licensed by the town to collect and dispose of their commercial waste. A flow control law enacted by the town in 1987 directing the flow of waste within the town to its resource recovery facility was determined by the town attorney to be unenforceable following the *Carbone* decision. The law had been enacted in an attempt to insure that the town would meet its contractual obligation to the operator of the local resource recovery facility, Ogden Martin Systems of Babylon, Inc. (Ogden Martin), to deliver 225,000 tons per year of solid waste to the incinerator, or suffer a penalty for any shortfall. In addition, the agreement with Ogden Martin compels the town to pay Ogden Martin fourteen million dollars a year, regardless of the tonnage of waste delivered to the incinerator.

The town's solution was to create a commercial garbage district, and to select, through a competitive bid, a single carter (Babylon Source Separation Commercial Inc. [BSSCI]) to collect commercial solid waste within the district. The contract entered into between the town and BSSCI guaranteed that only BSSCI would be permitted to collect commercial solid waste within the district. To insure that the waste collected would be delivered to the Ogden Martin resource recovery facility, the contract permits BSSCI to deliver up to 96,000 tons per year to the resource recovery facility without charge. If the waste is taken anywhere else, BSSCI will be responsible for paying the disposal fee.

Because the 17 licensed commercial carters within the town had legally enforceable contracts with customers, the contract between the town and BSSCI was not self executing. In order to displace the licensed carters from their contracts and

customers, it was necessary for the town to amend its solid waste law (Babylon Town Code Chapter 133) so as to make it impossible for the formerly licensed carters to comply with their contractual obligations, or for their customers to use their services. Under the previous law, any entity licensed by the town could collect commercial solid waste. The town amended its local law on January 10, 1995 to eliminate general collection licenses within the district, and to authorize issuance of a Class 2 license, a license available only to a party under contract with the town or district to perform collection services within the district. Because BSSCI was the only entity under such a contract, it was the only entity eligible to receive a Class 2 license.

Although the district consists of all commercially zoned properties within the district, whether improved or unimproved, the town determined that it would exempt owners of vacant parcels from a flat $1,500.00 fee imposed on owners of improved parcels. Each improved property is entitled to basic service, consisting of collection by BSSCI of one cubic yard of commercial solid waste per week and one cubic yard of recyclable material every other week. If commercial businesses within the district require additional collection, they will be charged $9.75 for each cubic yard of solid waste above the first cubic yard per week.[2]

The 17 carters previously licensed by the town to collect commercial solid waste anywhere within the town now may only

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[2] While the town charges a tipping fee of $65.00 per ton at its incinerator, when the cost of collection (based on the contract with BSSCI) is taken out, and the assumption made by the Town as to the weight of an average cubic yard of commercial solid waste is factored in, the $1,500 annual fee equates to a charge of approximately $271.00 per ton for disposal of the first cubic yard of commercial waste collected each week, and the $9.75 per cubic yard charge amounts to approximately $112.00 per ton for disposal

obtain a license to collect such waste outside of the new district, and their customers may no longer use their services. If these carters collect solid waste within the district, both they and their customers will be subject to fine and/or incarceration for up to 15 days.

Petitioner Friendly Carting, Inc. ("Friendly") is one of the seventeen carters formerly licensed by the town to collect commercial solid waste. Friendly Carting is owned by Anthony Leteri, who also owns petitioner U.S.A. Recycling, Inc. ("U.S.A."). Both Friendly and U.S.A. are located in Smithtown, a neighboring town. U.S.A. has a permit issued by the State of New York authorizing it to operate a solid waste management recycling facility. U.S.A.'s permit allows it to receive mixed commercial solid waste, to remove recyclables from the mixed waste, and to dispose of the residue at any facility licensed to receive it. At the time the Babylon Town Code was amended in January, 1995, approximately 60% of the mixed commercial waste U.S.A. received at its facility was separated for resale to companies located both within and without New York State.

Friendly Carting provides U.S.A. with access to the Babylon market. The Babylon District went into effect on January 1, 1996, and U.S.A. no longer will be able to process waste generated from within the Babylon commercial district in accord with its New York license. Thus, approximately 60% of the mixed commercial solid waste from within the District that U.S.A. previously processed will be incinerated instead of recycled.

The Decisions Below:

On February 2, 1995, the district court granted petitioners' motion for a preliminary injunction. Although Chief Judge Platt

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of waste above the first cubic yard each week.

did not agree that a violation of rights secured by the Commerce Clause constituted irreparable harm, he refused to allow the status quo to be altered "[b]ecause I think on my reading of the Carbone case, in any event, as a matter of law and it's virtually the equivalent of granting a permanent injunction at this point, is that matter -- that that matter of law has got to be overturned, in my book, to not require me to maintain the status quo." (A.A. & M.Appendix 59a). Chief Judge Platt saw no meaningful distinction between the Town of Clarkstown's flow control law that was ruled invalid in *Carbone*, and the Town of Babylon's contractual obligation to allow BSSCI to dump 96,000 tons per year of commercial garbage at the Ogden Martin resource recovery facility for free, because the Town thereby created "not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility" (A.A. & M. Appendix 52a).

The Town and BSSCI appealed, and the Second Circuit Court of Appeals reversed (A.A. & M. Appendix la-46a). Although it found that the district court erred when it granted a preliminary injunction without finding irreparable harm, it reached the merits of the Commerce Clause argument, holding (A.A. & M. Appendix 45a):

> First, towns can assume exclusive responsibility for the collection and disposal of local garbage. Second, towns can hire private contractors to provide municipal services to residents. In neither case does a town discriminate against, or impose any burden on, interstate commerce. The local interests that are served by consolidating garbage service in the hands of the town -- safety, sanitation, reliable garbage service, cheaper service to residents -- would in any event outweigh any arguable burdens place on interestate commerce.

The Second Circuit's conclusion that towns can assume exclusive responsibility for the collection and disposal of local garbage was predicated on its observation at the outset of its decision that "For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States." (A.A. & M. Appendix 2a). Acknowledging that *California Reduction Co.* and *Gardner* did not "address whether the municipal waste systems comported with the Commerce Clause," the lower court stated that it would squarely face that question (A.A. & M. Appendix 2a).

The Second Circuit first found that "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the limitations of the dormant Commerce Clause because it constitutes regulation of that market, not participation in it." (A.A. & M. Appendix 18a). Having acknowledged that the town obtained control over the commercial garbage collection market through regulation, however, the court thereafter disregarded this fact in the balance of its decision. The Court of Appeals found that Babylon was a market participant when it purchased collection services from BSSCI, and disposal services from Ogden Martin, and thus could do what it wanted with the services it had purchased. The court found, erroneously, that those services had been purchased with general taxes, rather than through user fees imposed on a captive market. It then concluded that there was no discrimination against interstate commerce without ever determining whether the "practical effect and design" of the regulatory scheme as a whole discriminated against interstate commerce, as this Court instructed should be done in *Carbone*, 114 S.CT. at 1682-83.

At the conclusion of its decision, the Second Circuit returned to the premise which marked its opening -- that it was deciding the case "against the backdrop of two venerable,

and until now unchallenged, decisions of the Supreme Court [*California Reduction Co.* and *Gardner*]. (A.A. & M. Appendix 40a). The Second Circuit "refuse[d] to undercut the longstanding precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." (A.A. & M. Appendix 43a).

REASONS FOR GRANTING THE WRIT

I.

REGULATION WHICH ENTIRELY ELIMINATES PRIVATE COLLECTION AND DISPOSAL SERVICE IN THE SOLID WASTE COLLECTION AND PROCESSING INDUSTRY IN FAVOR OF MUNICIPAL SERVICE DISCRIMINATES AGAINST INTERSTATE COMMERCE.

A. Without Prior Congressional Authorization, a Municipality May Not Require Exclusive Participation in its Own Solid Waste Services.

The Second Circuit ignored the "practical effect and design" of the Babylon scheme as a whole, and instead analyzed each component part in a vacuum, finding each part to be constitutional. Although the court found that the Town's "decision to eliminate the commercial garbage collection market constitutes 'market regulation' rather than 'market participation,'" it nevertheless found that "it does not discriminate in any way against interstate commerce." (A.A. & M. Appendix 19a). The lower court's strained reasoning is that there is no discrimination because the Town eliminated the market entirely, and that "not

even the Town itself remains as a seller in the market'' (A.A. & M. Appendix 19a). Rather, ''[a]lthough the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base'' (A.A. & M. Appendix 19a-20a). Even though ''taxpayers in the District ultimately foot the bill for these garbage services -- just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments -- the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* [*SSC Inc. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)] required, and that rendered those ordinances discriminatory against interstate commerce.'' (A.A. & M. Appendix 21a).

But for the Babylon scheme, 96,000 tons per year of commercial solid waste would be available to the interstate market for processing, recycling and disposal. Here, as in *Carbone*, the ''design and effect'' of the scheme as a whole is to hoard ''solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.'' 114 S.Ct. at 1683.

Under the reasoning of the Second Circuit, *Carbone* stands only for the narrow proposition that a municipality may not adopt local laws or ordinances directing the flow of solid waste within the municipality to a private facility. Based on this view, regardless how much solid waste is generated within a municipality's borders which was formerly available to the interstate processing market for recycling and/or disposal, the municipality may constitutionally cause the solid waste to flow to the municipality's facility, without concern that by doing so, it will be considered to have discriminated against interstate commerce.

The Commerce Clause implications of the Babylon solid

waste scheme cannot be determined by analysis of its separate parts in isolation as the Second Circuit did ("we proceed to decide *whether each component* of Babylon's waste management system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause.") (emphasis added) (A.A. & M. Appendix 17a). Courts must look to the "practical effect and design" of a regulatory scheme to determine whether a municipality is discriminating against interstate commerce. *Carbone*, 114 S.Ct. at 1682-83. In *West Lynn Creamery v. Healy*, 114 S.Ct. 2205 (1994), this Court rejected the suggestion that it should review the elements of the state regulatory program before it separately. Even though the various components of the program, viewed separately, might have been constitutional, this Court said, "[t]he choice of constitutional means *** cannot guarantee the constitutionality of the program as a whole." 114 S.Ct. at 2215.[3]

In *Carbone*, the Town of Clarkstown was contractually obligated to pay for the debt service incurred by the private operator that constructed the transfer facility, and after five years, could have purchased the facility for one dollar. In Babylon, the Town is contractually obligated to pay off the debt service incurred by the Babylon I.D.A., the entity that paid for construction of the Ogden Martin Resource Recovery Facility. There is no meaningful distinction between Clarkstown's and Babylon's circumstances. Justice Souter, in his dissenting opinion in *Carbone*, noted that the case before the Court involved a municipal, not a private, facility,[4] and cited *Gardner*

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[3] The Town's critical need to divert 96,000 tons per year of commercial garbage to the Ogden Martin facility establishes why the lower court's effort to analyze the collection and disposal aspects of the Babylon scheme separately makes no sense. Collection cannot be accomplished in a vacuum -- the garbage must be set down somewhere so that it can either be processed or disposed of. The scheme adopted by the town is not different in "design and effect" from the flow control law it conceded could no longer be enforced after *Carbone*.

[4] Before this Court in the Joint Appendix in *Carbone* was the affidavit

and *California Reduction Co.* for the proprosition that "the Court recognized that for municipalities struggling to abate their garbage problems, the Constitution did not require unimpeded private enterprise." 114 S.Ct. at 1697 n. 10. The significance of the 1905 cases relied upon by the Second Circuit was fully argued by the Town of Clarkstown,[5] but its argument did not prevail.

Gardner and *California Reduction Co.* did not discuss the Commerce Clause implications of the municipal schemes under review. This is not surprising. In 1905, incinerators had no pollution control devices, and landfills were unlined; garbage could be burned or buried without any processing whatsoever.[6] Additionally, compaction vehicles capable of taking advantage of economies of density, and the use of transfer stations where waste could be unloaded into larger vehicles or temporary storage facilities, needed to help overcome the problems of distant collections, were not introduced until after World War II.[7]

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of the Supervisor of the Town of Clarkstown, Charles E. Holbrook, who discussed the "contract for the construction and operation of the TOWN's transfer station...". Joint Appendix, *C & A Carbone v. Town of Clarkstown*, Supreme Court Index No. 92-1402, at 9-11.

[5] Respondent Town of Clarkstown made references to both of the 1905 cases throughout the Brief it filed in *Carbone*. *See* Brief for Town of Clarkstown, dated August 23, 1993, at 13, 22, 28-29, 41, 42 and 43.

[6] Melosi, "The 'Garbage Crisis' and the Weight of History," 1 J. Urban Technology, 1, 3 (1994):

> Collection and disposal systems in the nineteenth century were initially designed to deal with large amounts of organic material -- such as food waste and horse manure -- as well as with wood and coal ash, and an assortment of rubbish. For many years, little was known about the long-term environmental consequences disposing of waste beyond a growing suspicion about the potential health hazards of putrefying organic materials. Consequently, collection and disposal systems were chosen to conform with the popular notion of "out of sight, out of mind."

[7] *Id.* at 5.

Recycling, which has only recently achieved economic "takeoff", consisted of little more than people sorting through rubbish as it was loaded onto barges headed out to sea to look for material that might be sold to junkdealers.[8] In 1905, the low cost of disposal made it impractical for anyone outside of the immediate geographic area of the generator to compete for the waste.

By contrast, it is now well established that solid waste is "an article of commerce," *Fort Gratiot Landfill v. Mich. Dept. of Nat. Resources*, 112 S.Ct. 2019, 2023 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978), as is "the service of processing and disposing of it." *Carbone*, 114 S.Ct. at 1682. *Gardner* and *California Reduction Co.* did not have to be overruled by the Supreme Court in *Carbone* because their only import is that a municipality's exercise of exclusive control over solid waste is a proper exercise of its police power. *Carbone* establishes that the exercise of police powers in the solid waste area in a manner that discriminates against interstate commerce is *per se* invalid unless the town "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 114 S.Ct. at 1683.

Petitioners do not challenge the right of the Town to form a non-exclusive collection district, or to have a competitive bid process, which, if properly conducted, can lead to the selection of a single contractor to provide collection services for waste generated by departments of town government, or by anyone else who wishes to use the offered services. By preventing anyone but the favored contractor, BSSCI, from obtaining a license to collect solid waste within the District, by mandating that everyone within the District use the service offered, by enacting penalties for anyone other than BSSCI who attempts to collect solid waste within the District or for any generator

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[8] *Id.* at 9.

of commercial waste who attempts to use services other than those granted to BSSCI, and by using the money collected from the captive members of the District to subsidize disposal of waste at the Ogden Martin Resource Recovery Facility solely for the benefit of BSSCI, however, the Town goes too far.

Regardless whether a town's solid waste scheme benefits a private entity or the town itself, the impact on interstate commerce remains the same. In *Carbone*, the flow control law forced all waste within the town to be processed as an initial step at the town's transfer facility, from which it went off into interstate commerce, without limitation. This ordinance was found to discriminate against interstate commerce because no one but the operator of the preferred facility could perform the initial processing step. By contrast, the Babylon solid waste scheme forces all waste generated within the commercial district to flow to the Ogden Martin resource recovery facility, where it is incinerated and forever lost to commerce. The impact on interstate commerce of the Babylon scheme is far greater than the Town of Clarkstown's, yet Clarkstown's ordinance was ruled invalid, and Babylon's thus far has been sustained.

The Second Circuit placed great reliance on two 1905 cases of this Court which did not discuss the Commerce Clause, and virtually ignored this Court's 1994 decision in *Carbone*. The arguments made to and rejected by this Court in *Carbone* were repeated by the Town of Babylon, and accepted by the Second Circuit. Recent precedents of this Court should not be so lightly disregarded.

By way of example, this Court observed in *Carbone* (114 S.Ct.at 1681):

> [E]ven as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce

> Clause. It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.

Clarkstown argued that its ordinance did not discriminate because it required all waste, regardless of origin, to be processed at the designated facility before it left the Town. This Court rejected the argument, in part because (Id. at 1682):

> As the town itself points out, what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.
>
> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.

The Court viewed the flow control ordinance before it as "just one more instance of local processing requirements that [the Court long has] held invalid." *Id.* The "essential vice" in these laws is that they "bar the import of the processing service", *id.* at 1683, and "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*[9]

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[9] Under the reasoning of the Second Circuit, the outcome of *Carbone* would have been different had five years elapsed, and the town exercised the option to purchase the transfer station for the sum of one dollar. But the record in *Carbone* reflected the assumption that the transfer station involved was a municipal facility, operated, as in Babylon, by a private contractor. The outcome of the case turned on the practical design and effect of the local regulation on interstate commerce, and the majority concluded that barring everyone but the one local facility from having access to the initial processing step discriminated against interstate commerce. The fact that the Clarkstown transfer facility was a municipal facility was irrelevant.

"Discrimination against interstate commerce in favor of local business or investment is *per se* invalid," this Court said, "save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* Any such claim, however, must be "rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.*

Significantly, this Court ruled that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Id.* at 1684. If the goal is to assure the long-term survival of the designated facility (*Id.*):

> [T]he town may subsidize the facility through general taxes or municipal bonds. (citation deleted) But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Reasonable, nondiscriminatory alternatives to the District, such as economic flow control, have been shown to work by Babylon. In 1992, when the Town found that it was losing garbage to other jurisdictions because its tipping fee was too high, it lowered the fee from $78.00 per ton to $65.00, and immediately achieved the flow of garbage to the Resource Recovery Facility that it wanted; the town managed to maintain that flow throughout 1994, despite this Court's *Carbone* decision in May. Revenue shortfall was made up by an ad valorem tax. This was precisely what the majority in *Carbone* suggested was a reasonable, nondiscriminatory means of accomplishing the goal of ensuring the long-term survival of the designated facility: "If [that is the goal], the town may subsidize the facility through general taxes or municipal bonds." 114 S.Ct. at 1684. Because the Second Circuit concluded there was no discrimination against interstate commerce, it did not consider whether reasonable, nondiscriminatory alternatives to

the Babylon financing scheme existed.

The Second Circuit misconstrued the import of this Court's reference in *Carbone* to "general taxes". While the use of general taxes to subsidize a facility which cannot otherwise compete in the open market may not discriminate against interstate commerce,[10] the same cannot be said of the decision by Babylon to eliminate competition and take over the entire market through regulatory means for the benefit of that facility. The financing of the Babylon district through mandatory user fees from businesses that formerly could use other collection and disposal services underlines the critical fact that Babylon achieved control over its market as a market regulator, not as a market participant.[11]

Even had Babylon financed its solid waste scheme through general taxes, it would not be immune from Commerce Clause scrutiny. The issue for the Court would still be whether the practical design and effect of the scheme was to discriminate against Interstate Commerce. If a once open market suddenly

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[10] *But see City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 n. 6 (1978) which left open the question whether a municipality may, "consistent with the Commerce Clause, *** spend [municipal] funds solely on behalf of [municipal] residents and businesses". Because the Babylon scheme is financed by user fees, and not general taxes, this issue is not presented.

[11] "User fees are contractual in nature and a charge for the actual use of a service." Opinions N.Y.S. Comptroller 92-18 at 46. Here, the Town has determined that only the owners of improved property should be assessed the $1,500.00 flat annual fee, and that only users of the collection service who generate more than the quanitty covered by the flat assessment should pay an additional fee. The Town Board expressly determined that owners of unimproved property within the District would not be subject to charges. This determination precludes a finding that the fees charged are benefit assessments or taxes. Benefit assessments must be imposed upon all properties, not just improved properties. Opinions N.Y. S. Comptroller 92-18 at 46. Likewise, such fees cannot be considered a tax, for a tax in this context is "a charge to finance a municipal service, imposed without regard to whether the persons required to pay the charge are particularly benefitted by the service or actually use the service". *Id.* at 45.

becomes closed because of Babylon's exercise of regulatory control over the market, the scheme is invalid under *Carbone*.

The propriety of providing street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments which are paid for out of general taxes (A.A. & M. Appendix 20a) simply is not presented by this case,[12] and the Second Circuit's attempt to add solid waste services to this list is a "red herring" which seeks to divert analysis from the Commerce Clause issue. A nation-wide solid waste and recycling industry has been born and that industry is dependent upon access to local markets. If Congress concludes that it is desirable to allow Babylon or other municipalities to exercise exclusive control over solid waste within a given area, even though the resulting program will discriminate against interstate commerce and adversely affect the nation's solid waste and recycling industries, Congress may do so. The only issue for the lower court should have been whether the town's solid waste scheme discriminated against interstate commerce, not whether sound public policy should, nevertheless, allow the town to proceed.

B. The Market Participation Cases Decided by This Court Do Not Support the Second Circuit's Conclusion That a Municipality May Mandate Exclusive Use of a Single Supplier to Provide Solid Waste Services Without Discriminating Against Insterstate Commerce.

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[12] Even if it were necessary to compare Babylon's decision to provide exclusive solid waste services to other common services provided from general taxes, the conclusion would still be that solid waste services may not be provided on an exclusive basis. For example, when the town sweeps streets, it sweeps its own streets -- it does not compel private businesses to use the town's street sweeping services for their private driveways and parking lots, and then charge them a user fee for the service. Street lighting is provided by the town for public streets and buildings; the town does not compel private businesses to use town contractors if they wish to light their private buildings and parking lots, and force them to pay a user fee for the service.

Babylon has eliminated all competition in the commercial solid waste collection, processing and disposal market within the District, and has instructed the private businesses within the District that they have no choice but to use the town's service and pay whatever fee the town determines to be appropriate. Under the reasoning of the Second Circuit, this is not discrimination against interstate commerce because the town is simply acting as a market participant in the collection and disposal markets.

In arriving at its "market participant" rational, the Second Circuit ignored its own threshold conclusion that Babylon had gained control over the solid waste collection, processing and disposal markets within the District. Refusing to consider that the act of taking over the local markets in the first instance was itself discriminatory, the lower court looked to the market participation cases decided by this Court to justify the subsequent actions by the town. These cases, however, do not provide support for the lower court's untenable conclusion that the exercise of regulatory authority to exclude everyone from participating in a market but the municipality does not discriminate against interstate commerce.

This Court has developed an exception to the broad reach of the Commerce Clause to address situations where a state or municipality is directly acting as a participant in the market, rather than as a regulator. *Hughes v. Alexandria Scrap*, 426 U.S.794, 96 S.Ct. 2488 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204, 103 S.Ct. 1042 (1983); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *see, also, South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984).

Two reasons underlie the so-called market-participant doctrine. First, there is "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely

to exercise his own independent discretion as to parties with whom he will deal." *White v. Massachusetts Council*, 460 U.S. at 207 n. 3, 103 S.Ct. at 1044 n. 3, *quoting United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468 (1919). "Evenhandedness suggests that, when acting as proprietors, States should... share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves, Inc. v. Stake*, 477 U.S. at 439, 100 S.Ct. at 2278-79 (citations omitted). Second, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.* at 436-37, 100 S.Ct. at 2277 (citation omitted). "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.*

None of the market participant cases decided by this Court support the lower court's decision. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488 (1976), the Court upheld Maryland's decision to pay bounties for the destruction of any vehicle titled in Maryland, but to require out-of-state scrap processors to provide more extensive documentation than it required of in-state processors to show that the vehicle was abandoned and the wrecker had clear title. Maryland's scheme was not the kind of action covered by the Commerce Clause because the State had entered the market itself. *Id.* at 806. The critical distinction between the Babylon solid waste scheme and the Maryland statute at issue in *Alexandria Scrap* is that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur." 426 U.S. at 608. Maryland did not force people to sell abandoned vehicles to the State, but Babylon forces generators of commercial solid waste to use the Town's services.

The other cases decided by this Court where states or municipalities were found to be acting as market participants are similarly distinguishable from the Babylon scheme. In *Reeves*, 447 U.S. 429 (1980), the State reserved the right to sell

concrete from its plant to local residents in times of shortage -- it did not attempt to prevent its residents from purchasing concrete elsewhere. In *White*, 460 U.S. 204 (1983), the City established workforce requirements on City construction projects -- it did not attempt to dictate to contractors working for private parties who they should hire. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Court suggested it would have been proper for Oklahoma to compel state-owned utility companies to purchase 10 percent of all coal from Oklahoma suppliers, but ruled invalid the same requirement as applied to private companies. And in *South Central Timber Development*, 467 U.S. 82 (1984), the Court found that the market participant doctrine did not apply where the State required that timber taken from state lands be processed within the state prior to export. The market participation doctrine was found not to apply, even though Alaska did not force timber buyers to purchase the State's timber in the first instance.

The lower court ignored the regulatory aspects of the Babylon scheme which it found to be present, and determined only whether the scheme's individual parts fit within the market participation doctrine. The town did not enter into a commercial transaction in the marketplace alongside private businesses, however, and thus should not have been found to be a market participant, immune from Commerce Clause scrutiny. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (market participation exception would not apply because the state land commission had a complete monopoly over the sites being leased; only "state's participation in the marketplace as a *competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem. by an equally divided Court*, 471 U.S. 81 (1985).

Unless this Court clarifies the scope of the market participation doctrine, what was intended to be a narrow exception to the dormant Commerce Clause's prohibition against state or municipal actions that discriminate against interstate commerce

threatens to swallow the very protection the Commerce Clause was intended to provide.

C. The Second Circuit's Decision is Inconsistent With Rulings of the Third and Eleventh Circuits.

The decision of the Second Circuit is inconsistent with decisions in the Third and Eleventh Circuits, and the conflict should be resolved by this Court.

In *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3rd 701 (3rd Cir. 1995), the plaintiff, Atlantic, owned a transfer station in Philadelphia which received construction and demolition material for processing. Atlantic challenged the flow control provisions of New Jersey's comprehensive solid waste management system. The Third Circuit rejected the State's argument that the distinction between its system and that in Clarkstown, i.e., that New Jersey's designated facilities were regulated public utilities, should alter the Commerce Clause analysis (*Id.* at 718):

> [W]e do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

The Third Circuit went on to reject the State's market participation argument, in language clearly at odds with the decision of the Second Circuit in the instant case (*Id.* at 717):

> Under New Jersey's solid waste disposal program, the districts are doing more than making choices about what waste they will accept **even in those instances where the district owns the designated facility.** The waste flow regulations purport to control the market activities of private market participants. **Those regulations do not concern only the manner of operation of the government-**

> **owned or government-managed designated disposal facilities; they require everyone involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal. They do not merely determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service -- even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant. As a result, those regulations are not immune from review under the Commerce Clause.** (emphasis added)

The Second Circuit's decision is also inconsistent with the Eleventh Circuit's decision in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,* 29 F.3d 641 (11th Cir.1994), *affirming,* 814 F.Supp. 1566 (M.D. Ala. 1993), where the court flatly rejected an attempt by three municipalities to stave off a commerce clause challenge to ordinances governing the collection and disposal of solid waste, the purpose of which was to direct all solid waste to a disposal facility to be constructed by a public non-profit corporation organized under state law. One of the three municipalities, the City of Geneva, Alabama, by ordinance, vested in the city title to all waste generated within the city's boundaries and prohibited private collectors from contracting directly with generators of solid waste. Geneva retained the exclusive right to collect all solid waste generated within its borders unless it chose to contract with private haulers and collectors. As in the instant case, the ordinances required public participation, prohibited private businesses from collecting and disposing of solid waste unless the businesses complied with the ordinances, prohibited businesses that failed to comply with the ordinances from using public streets to collect and haul solid waste, and threaten-

ed civil enforcement and misdemeanor penalties against violators. The Eleventh Circuit flatly rejected Geneva's and the other municipalities' claims that they were market participants: "[t]he expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but broad market regulation." 814 F.Supp. at 1572-73.

D. The Impact of the Second Circuit's Ruling on Interstate Commerce Will Be Significant.

"The volume of commerce affected measures only the *extent* of the discrimination[, and] is of no relevance to the determination whether a State has discriminated against interstate commerce." *Fort Gratiot Landfill v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019, 2025 n. 4 (1992), *quoting Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992) (emphasis in the original); *see, also, Oregon Waste Systems v. Dept. of Env. Quality*, ____ U.S. ____, 114 S.Ct. 1345, 1350 n. 4 (1994). Nevertheless, the implications of the Second Circuit's reasoning are enormous. Within New York State alone, thirty-seven local municipalities have been authorized by the State to adopt flow control laws,[13] and more than twenty states in all have granted similar authority to their local governments (*Carbone*, 114 S.Ct. at 1690 [O'Connor, J., concurring]). The road map for circumnavigating this Court's decision in *Carbone* approved by the Second Circuit, unless reversed, will undoubtedly be followed across the country, with the result that we will have the "type of balkanization the [Commerce] Clause is primarily intended to prevent." *Carbone*, 114 S.Ct. at 1690 (O'Connor, J., concurring)

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[13] *See* the following New York laws: L. 1976, ch. 913 (Niagra Co.); L. 1979, ch. 509 (Town of Oyster Bay); L. 1979, ch. 510 (Town of North Hempstead); L. 1980, ch. 560 (New York City); L. 1981, ch. 932 (Onondaga County); L. 1982, ch. 632 (Town of Islip); L. 1982, ch. 675 (Dutchess Co.); L. 1983, ch. 502 (St. Lawrence Co.); L. 1983, ch. 513 (Washington Co.); L. 1983, ch. 930 (Broome Co.); L. 1984, ch. 638

The need to clarify the market participation doctrine and the principles set out in *Carbone* is apparent, for lower courts are showing an alarming tendency to ignore the teachings of this Court. For example, on the same day that it rendered its decision in the instant case, the Second Circuit also decided *SSC, Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995). There, the Second Circuit agreed that a flow control law compelling all solid waste collected within the town to be delivered to a local resource recovery facility discriminated against interstate commerce and was void under *Carbone*, but sustained the same provision in a contract between the town and a carter who had won a competitive bid to provide collection services within a residential district.[14]

The Third Circuit also has adopted a strained interpretation of Carbone in order to avoid having to invalidate a local flow control scheme. In *Harvey & Harvey, Inc. v. County of Chester*,

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(North Hempstead Solid Waste Management Authority); L. 1985, ch. 478 (Town of Babylon); L. 1985, ch. 670 (Jefferson and Lewis Counties); L. 1985, ch. 697 (Essex Co.); L. 1985, ch. 797 (Town of Hempstead); L. 1986, ch. 627 (Western Finger Lakes Solid Waste Management Authority); L. 1986, ch. 840 (Town of Huntington); L. 1986; ch. 936 (Ulster Co.); L. 1987, ch. 71 (Warren Co.); L. 1987, ch. 485 (Orleans Co.); L. 1987, ch. 747 (Montgomery Otsego and Schoharie Counties); L. 1987, ch. 773 (Saratoga Co.); L. 1988 ch. 627 (Oneida and Herkimer Counties); L. 1988, ch. 665 (Franklin Co.); L. 1988, ch. 667 (Town of Brookhaven); L. 1988, ch. 670 (Essex Co.); L. 1989, ch. 80 (Town of Smithtown); L. 1989, ch. 726 (Eastern Rensselaer Co.); L. 1991, ch. 540 (Fulton Co.); L. 1991, ch. 569 (Madison Co.); L. 1991, ch. 631 (certain towns in Westchester Co.); L. 1992, ch. 252 (Tompkins Co.); L. 1992, ch. 350 (Greene Co.); L. 1992, ch. 369 (Sullivan Co.); L. 1992, ch. 391 (Greater Troy Solid Waste Management Authority); L. 1992, ch. 567 (Town of Riverhead); L. 1992, ch. 629 (Westchester Co.).

[14] Currently pending before this Court is the petition of SSC Corp. for a writ of certiorari from so much of the Second Circuit's decision as sustained the flow control provision in the contract, and the cross-petition of the Town of Smithtown from the portion of the ruling that ruled invalid the town's flow control ordinace.

68 F.3d 788 (3d Cir. 1995), the Third Circuit addressed two separate Commerce Clause challenges to municipal flow control plans. The lower court concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, there is no Commerce Clause violation. *Carbone* stresses that the focus of inquiry must be on the "design and effect" of the challenged scheme, 114 S.Ct. at 1683, not the process. Despite what appeared to be a clear ruling in *Carbone*, the Third Circuit has concluded that a factual inquiry must be made in each flow control case before it can be determined whether there has been discrimination against interstate commerce.

The difficult task of reconciling conflicting policies which must be undertaken whenever a state or municipality perceives the need to adopt protectionist laws and ordinances that discriminate against interstate commerce is placed by our Constitution squarely on the shoulders of Congress -- not on the lower courts. If the protection offered by the Commerce Clause is not to be swallowed whole by its exceptions, this Court must intervene and clarify its prior rulings.

II

DEPRIVATION OF RIGHTS SECURED BY THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION PROVIDE A PROPER BASIS FOR A DETERMINATION THAT IRREPARABLE HARM WILL RESULT WITHOUT A PRELIMINARY INJUNCTION.

The Second Circuit agreed with the town's and BSSCI's claim that Chief Judge Platt committed reversible error by granting a preliminary injunction despite concluding that petitioners would not be irreparably harmed in its absence. Although the lower court could have affirmed the order of the district court "on any ground that appears in the record below," *Frankel v. Slotkin*, 984 F.2d 1328, 1334 (2d Cir. 1993), and there

was ample evidence that petitioners would have been irreparably harmed but for the preliminary injunction, the Second Circuit found that it was error to have granted the preliminary injunction.

This case raises the question whether the principle that a deprivation of constitutional rights or privileges or immunities under the United States Constitution constitutes irreparable injury, *see Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), should be applied to deprivations of rights secured under the Commerce Clause. There is a conflict among the lower courts on this issue. *Compare, Mid-America Waste Systems, Inc. v. Lee Fisher*, case no. C-2-94-493 (U.S. Dist. Ct. So. Dist. Ohio) (May 31, 1994) (violation of Commerce Clause supported issuance of TRO); *C & A. Carbone v. Town of Clarkstown*, 770 F.Supp. 848, 854 (S.D. N.Y. 1991) (accord); and *Garcia v. Hon. Bauza Salas*, 686 F.Supp. 965, 971 (D.P.R. 1988) (accord), *with Grand Central Sanitation, Inc. v. City of Bethlehem*, 1994 U.S. Dist., LEXIS 15825 (E.D. Pa. 1994).

This conflict should be resolved by the Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[1a-46a]

DECISION OF THE SECOND CIRCUIT COURT OF APPEALS (SEPTEMBER 19, 1995)

[This document is contained in the Appendix to the Petition for Writ of Certiorari filed in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon, et al.*, which was filed in the Supreme Court on January 30, 1996 (No. 95-1223), and is incorporated herein by reference].

APPENDIX B

[47a-102a]

TRANSCRIPT OF DISTRICT COURT PROCEEDINGS (February 2, 1995)

[This document is contained in the Appendix to the Petition for Writ of Certiorari filed in *A.A. & M. Carting Service, Inc., et al. v. Town of Babylon, et al.*, which was filed in the Supreme Court on January 30, 1996 (No. 95-1223), and is incorporated herein by reference].

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of November one thousand nine hundred and ninety-five.

USA Recycling, Inc., et al.

Plaintiffs-Appellees,

v.

Dkt. No.: 95-7129

Town of Babylon, et al.,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee USA Recycling, Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By:_____
Beth J. Meador,
Administrative Attorney

APPENDIX D

STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

BABYLON TOWN CODE CHAPTER 133 (SOLID WASTE MANAGEMENT) ADOPTED JANUARY 10, 1995:

SECTION 133-4(A) (Collection and Disposal):

The removal, transportation and/or disposal of solid waste shall be managed, supervised and/or performed by the Town or its agent(s) under this chapter, together with such rules and regulations as the Town has or shall from time to time adopt. Such solid waste generated within the Town shall be removed, transported and/or disposed of only by refuse collectors licensed pursuant to the requirements of this chapter and the amendments thereto or as permitted by the terms of any agreement with the Town. All other persons are hereby prohibited therefrom except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter. ***

SECTION 133-14 (LICENSE CLASSIFICATIONS AND FEES):

A. A Class 1 license shall be required of all persons engaged in the collection and transportation of garbage, refuse, recyclable material, ashes or solid waste outside the improvement areas, or for collection and transportation of recyclable material only within the commercial improvement area if properly authorized by the property owner. ***

B. A Class 2 license shall be required of all persons engaged in the collection and transportation of garbage, refuse, solid waste and recyclable material within an improvement area authorized pursuant to a contract with the Town to collect and transport solid waste, garbage, refuse or recyclable material. ***

SECTION 133-31 (PENALTIES FOR OFFENSES):

A. Notwithstanding any other provision of this chapter, ... the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

SECTION 133-37 (USE OF UNLICENSED PRIVATE COLLECTORS):

A. It shall be unlawful for any person to enter into any agreement or arrangement, whether a fee is paid therefor or not, whereby a person not licensed by the Commission pursuant to this chapter, removes solid waste, rubbish or debris, recyclable material, or construction and demolition debris within the Town.

B. No person shall be cited for a violation of this section unless given an opportunity to terminate the agreement or arrangement with the unlicensed collector within fifteen (15) days of receipt of a notice from the Town advising that the collector being used is unlicensed and said person refuses to terminate said agreement or arrangement within the fifteen-day period.

COMMERCIAL WASTE COLLECTION AND RECYCLING SERVICE AGREEMENT BETWEEN THE TOWN OF BABYLON ON BEHALF OF THE TOWN OF BABYLON COMMERCIAL GARBAGE DISTRICT NO. 2 AND BABYLON SOURCE SEPARATION COMMERCIAL, INC. (ENTERED INTO DECEMBER 2, 1994):

ARTICLE 1 (DEFINITIONS):

Basic Service. The basic Service shall be provided to each Eligible Parcel. The service shall consist of once a week collection of a one cubic yard container of CII [i.e., commercial, industrial and institutional]- Refuse and the

equivalent of once every other week collection of a one cubic yard container of CII-Recyclables.

ARTICLE 2 (SCOPE OF SERVICES):

***

It is the intent of this Agreement to grant exclusive Collection services of CII Refuse within the District. To effectuate this intent the Town will issue only one license to provide collection services of CII Refuse to Eligible Parcels within the Town of Babylon Garbage District No. 2.

SECTION 2.2.7 (DISPOSAL):

Contractor may deliver CII Refuse collected by dedicated Collection Vehicles from eligible Customers to the Town Resource Recovery Facility or such other Disposal Site that the Town may direct. Alternatively, Contractor may deliver CII Refuse collected from Eligible Customers to an alternate Disposal Site for disposal at its own cost. During the first year of the term of this Agreement, contractor shall have the right to dispose of 96,000 tons of CII Refuse at the Town Resource Recovery facility at no charge to the Contractor.